BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN R. GUTHRIE Claimant VS. **WALMART STORES, INC.** Respondent AND **ILLINOIS NATIONAL INSURANCE CO.** Insurance Carrier	)	Docket No. **1,053,220**

ORDER

Respondent and its insurance carrier request review of the July 29, 2011 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of employment with respondent and that claimant gave timely notice of his injury.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment and whether claimant gave timely notice.

Claimant argues the ALJ's Order should be affirmed.

The issues raised on appeal are whether claimant provided respondent with timely notice of his alleged injuries as required by K.S.A. 44-520 and, if so, whether claimant met his burden of proof to establish he suffered accidental injury arising out of and in the course of employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a stocker for respondent working the night shift. His job as a stocker required him to stock dairy products on Wednesdays, grocery items on Thursdays, frozen foods on Fridays and Saturdays and then grocery items on Sundays. Claimant alleged injury to his back sometime towards the end of July and the first part of August 2010. He further testified that he had additional work in the dairy and frozen goods because co-workers were on vacation. Claimant was unloading product when he noticed his back started seizing up on him. He continued to work but the middle to low back pain got worse.

Claimant told a co-worker that his back was hurting really bad due to the extra work. His supervisor came to where claimant and the co-worker were standing and claimant told his supervisor that doing the frozen and dairy was "killing his back." Claimant testified that his supervisor apologized because no one realized both the co-workers were on vacation at the same time. Claimant testified:

> Q. After you told Josh what happened and he said he was sorry, what happened next? Did you keep working?
>
> A. Yeah, I just kept on. I knew it was Saturday and all I had was one more day and then I could ice it down and do the heat and go from there.
>
> Q. So you finished out your shift?
>
> A. Yes.
>
> Q. And back pain and hip, right hip were still hurting you?
>
> A. Yes.[1]

Claimant worked Sunday and noted his back condition worsened. Claimant was then off work. When he attempted to return to work he told the assistant manager, who was across the room clocking employees into the computer, that he had hurt his back the other night at work and couldn't work. Claimant testified the assistant manager told him to go home.

Robert Hamm, respondent's assistant manager, was claimant's supervisor on the night shift. Mr. Hamm testified that claimant did not report a work-related injury to him. Diana Riebel, respondent's support manager and also claimant's supervisor, testified that she was aware that claimant had back problems but he never said he had suffered a work-related accident. And Joshua Foster, respondent's assistant manager, testified that he knew claimant had mentioned that his back was always hurting but he also denied being told by claimant that his back pain was due to work.

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[1] P.H. Trans. at 16.

Consequently, respondent initially argues that claimant failed to provide timely notice of his alleged accidental injury.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[2] The time limits set forth in K.S.A. 44-520 begin with the date of accident. In order to determine whether notice is timely, the appropriate date of accident must first be determined.

In this case claimant alleged he suffered a series of repetitive injuries over the course of a few days.

K.S.A. 2010 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[3]

K.S.A. 2010 Supp. 44-508(d) goes on to state,

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[4]

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[2] K.S.A. 44-520.

[3] K.S.A. 2010 Supp. 44-508(d).

[4] K.S.A. 2010 Supp. 44-508(d).

K.S.A. 2010 Supp. 44-508(d) offers a series of possible "accident dates" for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative options for an accident date established by statute has occurred.

When claimant left work there was no authorized physician designated to provide treatment. Thus, the first and second criteria set forth in K.S.A. 2010 Supp. 44-508(d) have not been met. While there is mention in the doctors' medical records that claimant's condition started with lifting at work, there is no indication that claimant was provided copies of these writings. However, written notice was finally given to respondent by claimant on October 27, 2010. Therefore, pursuant to K.S.A. 2010 Supp. 44-508(d), the date of accident would be the date written notice of the injury is given to respondent. Here, notice and the date of accident occur on the same date. Therefore, timely notice of accident was provided.[5]

Respondent next argues claimant failed to meet his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment. Respondent argues that claimant had a preexisting degenerative lumbar condition which merely happened to become symptomatic at work.

Claimant testified that he had fractured his left hip in an automobile accident when he was 11 years old. Claimant testified that he would experience intermittent hip and back pain which would resolve after a few days. Claimant also sought chiropractic treatment from time to time. But claimant testified that this time the back pain was different and on the right side instead of the left. Initially, claimant thought it was muscle strain which would resolve but instead his condition progressively worsened.

Claimant sought treatment on August 2, 2010, with his chiropractor, Dr. Nathan Falk, since he could not get in to his doctor for over a week. He advised the chiropractor that he hurt his back lifting. Claimant did not get any relief from the low back pain so he went to Dr. Verdon Parham on August 24, 2010. X-rays were taken of the right hip which were negative. Upon physical examination, Dr. Parham found claimant had mild tenderness over the right sacroiliac joint area and also mild tenderness to the lateral aspect of the right hip and the anterior aspect of the hip. The doctor diagnosed claimant with right hip pain and acute muscle strain.

On September 17, 2010, claimant was examined again by Dr. Parham. The doctor found some tenderness in the paraspinous musculature on the right side and also tenderness anteroposteriorly to the right hip. Dr. Parham diagnosed claimant with right hip pain and right leg radiculopathy. The doctor ordered an MRI of claimant's lumbar spine and right hip.

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[5] See, *Saylor v. Westar Energy, Inc.*, ___Kan.___, 256 P.3d 828 (2011).

The lumbar spine MRI on September 21, 2010, revealed disk protrusion in the right paracentral location at L3-4 with what appears to be a disk fragment migrated slightly caudally behind the upper right posterior border of L4 causing contact with the exiting L4 nerve root; degenerative change in the lower three intervertebral disks; mild degenerative change in facet joints at L4-5; and also spondylolisthesis of L5 on S1.

Claimant returned for a follow-up visit with Dr. Parham to discuss the MRI results. Then on October 12, 2010, claimant returned for another follow-up with Dr. Barham. Upon physical examination, claimant had tenderness in the low back area and difficulty getting out of the chair and with ambulating secondary to right leg pain. The doctor diagnosed L3-4 disk herniation and right leg radiculopathy.

At the request of claimant's attorney, Dr. Randall Hendricks, an orthopedic surgeon, examined and evaluated claimant on November 10, 2010. The doctor reviewed claimant's medical records and the MRI. Upon physical examination, claimant had numbness that radiated down the anterolateral aspect of the right lower leg and a positive sciatic stretch test. Dr. Hendricks diagnosed claimant with a large ruptured disk at L3-4 with a caudally extruded fragment producing substantial compression upon the neurologic structures and he took claimant off work beginning November 10, 2010. The doctor recommended a new lumbar MRI due to claimant's possible need for surgical intervention. Dr. Hendricks further opined that based upon the medical records he reviewed it appeared that claimant's pain began while employed with respondent and increased over about a 6-week period of time.

Claimant was lifting products off pallets when he first experienced the onset of back pain and as he continued working his back condition worsened. The claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment with respondent.[6]

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated July 29, 2011, is affirmed.

IT IS SO ORDERED.

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[6] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

[7] K.S.A. 44-534a.

[8] K.S.A. 2010 Supp. 44-555c(k).

Dated this 28th day of September, 2011.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge